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Status and Trends in State Product Liability Law: Theories of Recovery;Symposium on Product Liability: Note

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STATUS AND TRENDS IN STATE PRODUCT LIABILITY LAW: THEORIES OF RECOVERY

INTRODUCTION

A person suffering personal injury or property damage attributable to a defective product may sue on three grounds: negligence, breach of warranty or strict tort liability.[1] Each remedy brings to product litigation a unique history, policy and set of rules. Recovery based on these theories is available in product cases in all but a few jurisdictions.[2]

This section will discuss the evolution of the three theories of recovery in the United States, paying particular attention to recent trends that may shape future changes in the three theories. The section will concentrate on strict liability, the most stringent of the three theories. Because it requires no showing of fault, strict liability has been attacked vigorously by critics as being unfairly weighted in favor of the plaintiff. The section will examine several recent state statutes aimed at limiting the applicability of strict liability. The legislative inertia necessary to pass these provisions has come from those who argue that an overly generous system has created a national crisis in which manufacturers and retailers can no longer obtain adequate liability insurance.

NEGLIGENCE

Every state affords recovery in product cases based on negligence principles.[3] In a negligence action, the plaintiff must prove that the manufacturer marketed an unreasonably dangerous product, that the product proximately caused the plaintiff's injuries and that the defect existed while the defendant still had control of the product.[4] The negligence theory focuses upon the conduct of the manufacturer and places the burden on the plaintiff to establish that the manufacturer failed to act reasonably in producing and marketing the product.[5]

The negligence of the manufacurer is often difficult for the plaintiff to prove in product actions. As a practical matter, the manufacturer often controls the evidence of its negligent conduct, which renders it inaccessible

1. An extensive review of these doctrines is beyond the scope of this note. For a more complete discussion, *see* W. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971).
2. Negligence is a recognized basis of recovery in product injury actions in every jurisdiction. *See* Wade, *On the Nature of Strict Liability For Products*, 44 MISS. L. REV. 825, 825-26 (1973). Breach of warranty under the Uniform Commercial Code is an additional basis of recovery in all jurisdictions but Louisiana. *See* [1986] 1 PROD. LIAB. REP. (CCH) ¶ 1023. Finally, strict tort liability is recognized as a basis of recovery in forty-six jurisdictions, including Puerto Rico. *See* [1986] 1 PROD. LIAB. REP. (CCH) ¶ 4026-27. For a discussion of states rejecting strict liablity in tort, *see infra* notes 35-40 and accompanying text.
3. *See* Wade, *supra* note 2, at 825-26.
4. *See* W. Prosser, *supra* note 1, at 643.
5. 2 L. FRUMER & M. FRIEDMAN, PRODUCT LIABILITY, § 3.01[1], 3-4 (1986).

to the plaintiff.[6] Even when the evidence is available, it is often too complicated or technical for the plaintiff to understand and use in his or her case.[7] Consequently, the plaintiff may be precluded from recovering in a negligence-based product action. This problem has compelled most product liability plaintiffs to rely upon the more liberal theories of implied warranty and strict liability in tort as grounds for recovery.

BREACH OF WARRANTY

With the exception of Louisiana, all states allow recovery in product cases based on breach of warranty.[8] This theory of recovery is based on the seller's expressed or implied representations to the buyer or user of the product. When the seller reveals to the buyer the particular purpose for which the product is to be used, there arises an implied warranty that the product purchased is reasonably fit for that purpose.[9] An implied warranty is also created when the seller represents the product as reasonably fit for the general purpose for which it was manufactured.[10]

Liability in warranty arises where damages are caused by a failure of the product to conform with such representations made by the seller. The focus in warranty actions, therefore, is the condition of the product, not the fault of the seller. Recovery in warranty is not limited to immediate buyers. The traditional rule of privity, which requires that the plaintiff demonstrate a contractual relatedness to the seller of the product, has steadily eroded in the product liability context.[11] Consequently, remotely situated plaintiffs now have many avenues through which to recover against sellers. The Uniform Commercial Code clarifies the remaining

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6. *See* Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 621, 164 S.W.2d 828, 834 (1942); Prosser, *The Assault Upon the Citadels (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1114 (1960).
7. *See* Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436, 443 (1944) (Traynor, J., concurring) ("[t]he consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package").
See also Keeton, *Product Liability—Problems Related to Proof of Negligence*, 19 SW. L.J. 26 (1965).
8. [1986] 1 PROD. LIAB. REP. (CCH) ¶¶ 1020, 1023.
9. U.C.C. § 2-315 (1977) (an implied warranty of fitness for a particular purpose arises if the buyer relies upon the seller's representation of safety and adequacy and the seller guarantees that the product is appropriate for the use the consumer contemplates).
10. Id. § 2-314 (an implied warranty of merchantability arises when the seller guarantees that the product is of merchantable quality).
11. [1986] 1 PROD. LIAB. REP. (CCH) ¶ 1190, at 1121. The leading warranty decision abrogating the privity of contract rule was Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). In that case, the New Jersey Supreme Court held the manufacturer of an automobile and the dealer liable for injuries to a passenger in the car, based upon an implied warranty of safety to foreseeable users. Within a few years of this decision, courts in the vast majority of states followed New Jersey's lead and recognized the existence of implied warranties made directly to the users and consumers of assorted products. *See* 2A L. FRUMER & M. FRIEDMAN, PRODUCT LIABILITY § 6.102, at 6-74-76; W. PROSSER, *supra* note 1, at 654-55. For a discussion of the development of the privity rule prior to the *Henningsen* decision, *see* Prosser, *supra* note 6, at 654-55; Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957).

requirements of privity in actions by third parties against sellers and extends the buyer's warranty to family, household members and guests.[12]

Nonetheless, several obstacles still stand in the way of recovery under the warranty provisions of the U.C.C. First, a plaintiff may be barred from recovery in a product action based upon implied warranty if he or she does not first notify the seller of the breach within a reasonable time.[13] A plaintiff may also be barred from recovery if the seller of the defective product excludes or modifies the implied warranty.[14] Finally, a plaintiff relying upon a U.C.C. remedy will be barred from recovery if unable to show that he or she falls within the class of persons protected by implied warranty.[15] Consequently, recovery based upon the warranty provisions of the U.C.C. is more restrictive than recovery based upon strict liability in tort.[16]

STRICT TORT LIABILITY

Unlike a negligence action, which is based on the conduct of the defendant, or a warranty action, which is based on the seller's representations to buyers or users, a strict liability action is based on the quality of the product.[17] The most common expression of the doctrine of strict liability is provided by Section 402A of the Restatement (Second) of Torts,[18] which states that a defendant may be found liable if it sells a

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12. U.C.C. § 2-318 expresses three alternative rules relating to privity. Alternative A states that warranties extend from seller to "any natural person who is in the family or the household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty." Alternative B provides that warranties extend from seller to "any natural person who may reasonably be expected to use, consume or be affected by the goods. . . ." Alternative C states that warranties extend from seller to "any person who may reasonably be expected to use, consume or be affected by the goods. . . ." Twenty-nine jurisdictions have adopted some form of alternative A, six jurisdictions have adopted alternative B, and seven jurisdictions have adopted alternative C. In addition, five states completely abolished the privity requirement. [1984] 1 PROD. LIAB. REP. (CCH) ¶ 4017, at 4029-30.
13. U.C.C. § 2-607(3)(a) (1977). As Prosser notes, § 2-607(3)(a) often becomes "a booby-trap for the unwary" when applied to personal injury plaintiffs who purchase products from remote sellers. W. PROSSER, *supra* note 1, at 655. Nonetheless, many courts are more liberal when applying this section to individual purchasers than when applying it to commercial purchasers. *See* 2A L. FRUMER & M. FRIEDMAN, *supra* note 5, at § 6.14[2], at 6-181-88. *See also*, U.C.C. § 2-607(3)(a), official comment 4 (1977).
14. The nonmanufacturer seller may be able to disclaim the implied warranty of merchantability by simply informing the buyer that the warranty is excluded, or by stating that the product is being sold "as is" or "with all faults." U.C.C. § 2-316(3)(a). Nonetheless, many courts have disallowed liberal use of disclaimers and have held that disclaimer of warranty clauses as applied to individual consumers is unconscionable and against public policy. Moreover, the U.C.C. provides that a limitation or exclusion of consequential damages is prima facie unconscionable when applied to product-related injuries to consumers. *Id.* at § 2-719(3).
15. *Id.* at § 2-318. *See supra* note 12 and accompanying text for a discussion of alternative provisions of § 2-318.
16. Although privity, reliance and notice remain necessary elements in most breach of warranty actions, such restrictions are not relevant in strict tort liability actions.
17. [1984] 1 PROD. LIAB. REP. (CCH) ¶ 4000, 4005.
18. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

product "in a defective condition unreasonably dangerous to the user or consumer."[19] To recover under the Restatement version of strict liability, the plaintiff must demonstrate that the seller is engaged in the business of selling the product, and that the product was expected to and did reach the plaintiff in substantially the same condition as it was when sold.[20] Accordingly, the strict liability doctrine imposes liability without fault by relieving the plaintiff of the burden of proving the negligent conduct of the manufacturer.

Greenman v. Yuba Power Product, Inc.[21] was one of the the first decisions to discuss the rationales for applying strict liability. In *Greenman,* Chief Justice Traynor explained that the policy behind strict liability Is to require manufacturers to bear the cost of injuries caused by their defective products.[22] Furthermore, an important basis of strict liablity is the notion that the cost of injury may be overwhelming to the person injured, but the risk of injury can be insured by the manufacturer and distributed to the public as a cost of doing business.[23]

After the *Greenman* decision in 1963 and the adoption of Section 402A of the Restatement (Second) of Torts in 1964,[24] almost every state followed these leads and applied strict liability principles to product cases.[25] The rapid acceptance of strict liability can be seen as a judicial response to significant changes in marketing practices. Improvements in transportation and advances in technology have enabled interstate corporations to offer an array of new products to consumers throughout the country. The complexity of interstate manufacturing processes and marketing secrecy has rendered it nearly impossible for an injured plaintiff to prove a manufacturer's carelessness in marketing such a product.[26] Moreover, it it is now assumed that the manufacturer should anticipate many hazards and guard against their occurrence.[27]

Id.

20. *Id.*
21. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
22. 377 P.2d at 900.
23. 377 P.2d at 901.
24. 41 ALI PROCEEDINGS 375 (1964-1965). The institute did not publish its final version of § 402A until 1965. RESTATEMENT (SECOND) OF TORTS § 402A (1965).
25. 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY §§ 4:11-12 (2d ed. 1974).
26. *See, e.g.,* Nalbandian v. Byron Jackson Pumps, Inc., 97 Ariz. 280, 399 P.2d 681 (1965) (the consumer's vigilance has been lulled by advertising, marketing techniques and trademarks); Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring); Santor v. A. & M. Karaheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965) (the consumer does not have the ability to investigate for himself the soundness of the product).
27. RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965).

    For a discussion of other common public policy justifications for the application of strict liability *see generally* PROSSER, *supra* note 6; PROSSER, *The Fall of the Citadels (Strict Liability to the Consumer),* 50 MINN. L. REV. 791 (1966). For a critique of these policies supporting the adoption of strict liability, *see* EPSTEIN, *Products Liability: The Search for a Middle Ground,* 56 N.C.L. REV. 3, (1978); OWENS, *Rethinking the Policies of Strict Product Liability,* 33 VAND. L. REV. 681, (1981).

Most states using strict product liability theory have adopted the Restatement version of strict liability, imposing liability on sellers only for defects in manufacturing and design that render the product unreasonably dangerous to one's person or property.[28] A product is deemed "unreasonably dangerous" for the purpose of determining defectiveness when the finder of fact holds that it is dangerous to an extent beyond that contemplated by an ordinary purchaser.[29]

Some strict liability states, including New York, Pennsylvania and California, have rejected the unreasonable dangerousness requirement. These states argue that proof of unreasonable dangerousness relies upon discarded negligence principles that may confuse and mislead a jury.[30] They also argue that the requirement bears little relation to the defectiveness of a product.[31] These states instead have fashioned forms of strict liability absent the unreasonable dangerousness requirement.[32] New York courts recently discarded the term "unreasonable dangerousness" and replaced it with "not unreasonably safe" as the standard to apply in determining whether a product is defectively designed at the time of manufacture.[33] This "not reasonably safe" standard has also been adopted in Washington.[34]

Pennsylvania's standard for determining defectiveness is whether the product is "safe for its intended use."[35] Product defectiveness is found in Ohio, on the other hand, with either proof that the product is not safe for its intended use or that the dangerousness of the product outweighs its intended benefit.[36] Despite the proliferation of strict tort liability in

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28. [1986] 1 PROD. LIAB. REP. (CCH) ¶ 4016, 4026-27.
29. This standard is derived from the meaning of unreasonable dangerousness: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965). For an extensive discussion of states' adoption of comment i of Section 402A, *see* J. BEASLEY, PRODUCT LIABILITY AND THE UNREASONABLE DANGEROUSNESS REQUIREMENT 167-211 (1981).
30. *See, e.g.*, Mattock v. Daylin, Inc., 611 F.2d 30 (1979) (inclusion of the words "unreasonable dangerousness" in special verdict interrogatories was error requiring new trial); Azzarello v. Black Brothers Co., Inc., 480 Pa. 547, 391 A.2d 1020 (1978) (repeated use of the term "unreasonable dangerousness" in instructions to jury necessitated new trial).
31. *See, e.g.*, Cronin v. J.B.E. Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 443 (1972) (the term "defective condition unreasonably dangerous" has a connotation contrary to the purpose of strict liability, which was developed to relieve consumers from proving the more difficult elements of negligence). *See also* Baker v. Outboard Marine Corp. v. Pentz, 595 F.2d 1760 (3d Cir. 1979); Foglio v. Western Auto Supply, 50 Cal. App. 3d 470 (1976).
32. Although it has expressly rejected the requirement of unreasonable dangerousness, the Supreme Court of California has adopted a test for measuring defectiveness in design defect cases that at least partially replicates the "consumer expectation" test of section 402A comment i. *See* Barker v. Lull Engineering Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).
33. *See* Voss v. Black and Decker Mfg., Co., 59 N.Y.2d 102, 463 N.Y.S. 398 (1983).
34. *See* Kimble v. Waste Systems International, Inc., 23 Wash. App. 331, 595 P.2d 569 (1979); Seattle National Bank v. Tabert, 86 Wash. 2d 145, 542 P.2d 774 (1975).
35. *See* Azzarello v. Black Brothers Co., Inc., 480 Pa. 547, 391 A.2d 1020 (1978) (a standard suggesting the existence of a defect in the article is unreasonably dangerous or not duly safe is inadequate to guide a jury in determining liability).
36. *See* Birchfield v. International Harvester Co., 726 F.2d 1131 (6th Cir. 1984) (the defectiveness of a product must be measured by both the consumer expectation test and risk/benefit analysis).

product liability actions, a few states have been unwilling to adopt this doctrine in any form as a basis of recovery. Some jurisdictions instead embrace one form or another of strict liability based in warranty theory, as is the case in Michigan,[37] where it has been judicially adopted, and Massachusetts,[38] where it has been statutorily adopted. Michigan courts refuse to accept strict liablity in tort, noting that strict warranty liability offers sufficient protection for injured parties.[39] Similarly, Massachusetts courts refuse to accept strict liability in tort, arguing that an action based on the state warranty provisions afford plaintiffs better protection.[40] Delaware,[41] North Carolina[42] and Virginia[43] also have refused to accept strict tort liability but have not made any corresponding changes in the state warranty provisions to liberalize the basis for recovery.

Liability of Nonmanufacturers

The explosive growth of product liability actions in the last twenty-five years has not been restricted to suits against manufacturers. Virtually every state allows product liability plaintiffs to recover against wholesalers, retailers and other participants in the product distribution chain. Most jurisdictions hold these nonmanufacturers to the same degree of liability as the manufacturers of defective products.[44] The same standards of liability apply to all classes of sellers primarily because neither Section 402A nor the Uniform Commercial Code draw a distinction between manufacturers and nonmanufacturers.[45] The rapid and widespread adop-

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37. *See* Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965) (an innocent bystander who is injured by a defective product has an action against the manufacturer of the product based on breach of warranty theory, though there is no privity between the bystander and manufacturer).
38. The Massachusetts Legislature has embraced the concept of strict liability in warranty by eliminating the privity of contract, disclaimer of liability and notice of injury for warranty actions involving sales. MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West 1978).
39. 133 N.W.2d 129.
40. Swartz v. General Motors Corp., 378 N.E.2d 61 (Mass. 1978) (driver whose car plowed through a house and caused injury could not sue the manufacturer of the car on the basis of strict liability).
41. Wilhelm v. Globe Solvent Co., 373 A.2d 218 (Del. Super. 1977) (warranty provision of the U.C.C., rather than strict liability, governs product liability actions involving the sale of goods). *See also* Cline v. Prowler Industry of Md., Inc., 418 A.2d 1030 (Del. Sup. Ct. 1980).
42. Maybank v. S.S. Kresge Co., 302 N.C. 129, 273 S.E.2d 681 (1981) (strict liability is available only to dangerous instrumentalities, such as dynamite, and is therefore not available to claimant who was injured by an exploding camera flashcube).
43. [1986] 1 PROD. LIAB. REP. (CCH) ¶ 4015, at 4025.
44. 2A L. FRUMER & M. FRIEDMAN, PRODUCT LIABILITY, § 6.01[2] (1986).
45. The Restatement applies to "any persons engaged in the business of selling goods for use or consumption. It therefore applies to any manufacturer of such a product, [and] to any wholesaler or retail dealer or distributor." RESTATEMENT (SECOND) OF TORTS § 402A comment f (1965).

    The warranty provisions of the Uniform Commercial Code apply to sellers. U.C.C. §2-314(1). Because the Code broadly defines a seller as "a person who sells or contracts to sell goods," U.C.C. § 2-103(1)(d), the warranty provision likely will apply to nonmanufacturer product sellers.

tion of the Restatement and U.C.C. created a broad class of potentially liable defendants in product liability actions.[46]

Many states recently have sought to limit the liability of sellers, distributors and retailers. Legislation enacted for this purpose includes statutes of repose and indemnification statutes.[47] Another common type of statute enacted for this purpose has been nonmanufacturer protection statutes, which are specifically designed to limit the liability of nonmanufacturer sellers in product actions.[48] Generally, these statutes shift the liability from the distributor or retailer to the manufacturer directly responsible for the product defects. The immunity provided the nonmanufacturer, however, has been narrowly tailored by state legislatures in several ways. First, the statutes prohibit recovery from nonmanufacturers based upon strict liability in tort, but they do not prohibit recovery based upon negligence or breach of implied warranty.[49] For example, the Nebraska product liability statute simply bars any actions based on strict tort liability against any seller or lessor of either a defective or unreasonably dangerous product unless the seller/lessor is the manufacturer of the product.[50] Similar stautes have been enacted in Colorado,[51] Minnesota[52] and Illinois.[53]

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46. Courts have developed a number of rationales to justify the extension of liability to a broad class of sellers. The first case holding a nonmanufacturer strictly liable in a product liability action was Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964). Holding that the retailer of a defective product, as well as the manufacturer, was strictly liable for an injury caused by a defect, the California Supreme Court reasoned that "[s]trict liability of the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendant, for they can adjust the cost of such protection between them in the course of their continuous relationship." 391 P.2d at 172.

    For a discussion of other rationales offered by courts for extending strict liability to nonmanufacturers in product cases, *see* Leete, *Caught in the Middle: The Need for Uniformity in Product Liability Statutes Affecting Nonmanufacturer Sellers,* 18 WAKE FOREST L. REV. 997, 1004-05 (1982).

47. These statutes protect nonmanufacturer sellers from liability by providing them with an indemnity cause of action against manufacturers of the defective products. *See, e.g.,* ARIZ. REV. STAT. ANN. § 12-684 (1984); ARK. STAT. ANN. § 34-2806 (1983); IND. CODE ANN. § 34-4-20A-6 (Burns 1984); MINN. STAT. ANN. § 604.02 (1984); N.D. CENT. CODE § 28-01.1-07 (Supp.1985).

48. *See* COLO. REV. STAT. § 13-21-402 (Supp. 1987); IDAHO CODE. § 6-1407 (Supp. 1986); ILL. ANN. STAT. ch. 110, § 2-621 (Smith-Hurd 1984); KAN. STAT. ANN. § 60.3306 (1983); KY. REV. STAT. ANN. § 411.340 (Bobbs-Merrill 1986); MINN. STAT. ANN. § 544.41 (1984); NEB. REV. STAT. § 25-21,181 (1985); N.C. GEN. STAT. § 99B-2 (1985); OHIO REV. CODE ANN. § 2305.33 (Page Supp. 1986); TENN. CODE ANN. § 29-28-106 (1983); WASH. REV. CODE ANN. § 7.72.040 (West Supp. 1987).

49. One commentator has argued that by excluding recovery on the basis of strict liability but not on the basis of breach of warranty, these statutes undermine their own purpose of protecting nonmanufacturers in product actions. *See* Leete, *supra* note 46, at 1010-13.
    50 NEB. REV. STAT. § 25-21, 181 (1985).

51. COLO. REV. STAT. § 13-21-402 (1) (Supp. 1987). The Colorado statute, however, includes a broader definition of manufacturer that includes (1) any seller who had knowledge of the defect, (2) furnishes specifications for the product, (3) exercises significant control over the manufacturing process, or (4) alters or modifies the product in any significant manner. *Id.* By so defining manufacturers, Colorado allows plaintiffs to recover from a broader class of possible defendants than is available in other states.

52. MINN. STAT. ANN. § 544.41 (West 1984).

53. ILL. ANN. STAT. ch. 110, § 8021 (Smith-Hurd 1984).

A few states further restrict the protection of nonmanufacturers by carefully enumerating the circumstances under which this protection is available. Statutes enacted in Tennessee[54] and North Carolina[55] are noteworthy in this respect. The Tennessee statute provides that a seller cannot be liable in strict tort liability if the defective product was sold in a sealed container, or if the seller had no reasonable opportunity to inspect the product and discover its defective condition.[56] Although differently worded, the purpose of North Carolina's 1979 statutory provision[57] is identical to the Tennessee law. Similarly, the Kentucky Product Liability Act permits a wholesaler, distributor or retailer to escape liability if, by a preponderance of the evidence, the seller establishes that the product was sold in its original condition or package.[58] These statutes eliminate the duty of nonmanufacturers to inspect closed packages but do not eliminate possible liability for failing to inspect products not sold in packages.

The 1980 Idaho Product Liability Reform Act, like the Tennessee and North Carolina statutes, protects nonmanufacturer sellers from liability where they had no reasonable opportunity to inspect the product for defects.[59] Idaho's statute, however, withholds this protection from sellers who are directly involved in the production or marketing of allegedly defective products. Thus, a seller may be held liable to a plaintiff if (1) the seller alters or modifies the product without authority or direction from the manufacturer, (2) the seller provides plans or specifications that caused the plaintiff's injury, (3) the seller either is a wholly owned subsidiary of the manufacturer or wholly owns the manufacturer, or (4) the seller sold the product after its expiration date.[60]

Finally, nonmanufacturer protection statutes almost universally withhold protection to wholesalers, distributors and retailers when the plaintiff is unable to recover from the manufacturer. Thus, when the manufacturer of an allegedly defective product is not subject to service of process in the state, all statutes but one[61] allow a plaintiff to recover from a nonmanufacturer in an unrestricted action.[62] Provisions of this nature are based on the rationale that a plaintiff is entitled to compensation for his

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54. TENN. CODE ANN. § 29-28-106 (1983).
55. N.C. GEN. STAT. § 99B-2 (1985).
56. TENN. CODE ANN. § 29-28-106(a) (1983).
57. N.C. STAT. § 99B-2(a).
58. KY. REV. STAT. § 411.340 (Bobbs-Merrill 1986).
59. IDAHO ACTS § 6-1307 (1) (Supp. 1986). *See also* S.D. CODIFIED LAWS § 20-9-9 (1979).
60. IDAHO ACTS § 6-1307 (1) (Supp. 1986).
61. In order to recover in a product action, a plaintiff who is unable to obtain jurisdiction over the manufacturer in Nebraska must establish the seller's negligence or breach of warranty or sue in a jurisdiction where the manufacturer can be found. NEB. REV. STAT. § 25-21, 181 (1985).
62. *See* COLO. REV. STAT. § 13-21-402 (Supp. 1987); IDAHO CODE § 6-1407 (4)(a) (Supp. 1986); ILL. ANN. STAT. ch. 110, § 802(c) (Smith-Hurd 1984); KAN. STAT. ANN. § 60.3306 (1983); KY. REV. STAT. ANN. § 411.340 (Bobbs-Merrill 1986); MINN. STAT. ANN. § 544.41 (b)(c) (West 1984); N.C. GEN. STAT. § 99B-2(a) (1985); OHIO REV. CODE ANN. § 2305.33 (b)(4) (Page Supp. 1986); TENN. CODE ANN. §29-28-106(a) (1983); WASH. REV. CODE ANN. § 7.72.040 (2)(a) (West Supp. 1987). These state provisions are generally uniform with only minor variations in language.

injuries, even when the manufacturer cannot be brought into court.

Although some states protect nonmanufacturers whenever jurisdiction can be obtained over the manufacturer,[63] several states also permit plaintiffs to recover from a nonmanufacturer when it is judicially determined that the manufacturer is insolvent.[64] Product liability statutes in Idaho and Kansas also allow recovery from a nonmanufacturer if a court determines it is unlikely that the plaintiff will be able to enforce a judgment against the manufacturer.[65] By providing these exceptions to the protection provided nonmanufacturer sellers, these statutes ensure that plaintiffs will have a responsible party from whom they can recover.

CONCLUSION

With their rapid acceptance of strict liability theory during the 1960s, states greatly improved the odds that injured plaintiffs will receive compensation for their injuries. In recent years, however, states have experimented with various alterations to pure strict liability theory. One of the major forces behind such modifications has been the debate about whether the tort system has gotten out of hand and created a liability monster.

In time, application of the strict liability modifications discussed in this section may help develop a tort system that is fairer than the present system to plaintiffs and defendants. In the meantime, the only certainty is that further experimentation will take place.

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63. COLO. REV. STAT. § 13-21-402(2) (Supp. 1987); ILL. ANN. STAT. ch. 110, § 2-621 (Smith-Hurd 1984); KY. REV. STAT. ANN. § 411.340 (Baldwin 1986).

64. IDAHO CODE § 6-1407 (4)(b) (Supp. 1986); MINN. STAT. ANN. § 544.41 (West 1984); N.C. GEN. STAT. § 99B-2 (1985); OHIO REV. CODE ANN. § 2305.33 (B)(2)(6) (Page Supp. 1986); TENN. CODE ANN. § 29-28-106(A)(1), (A)(2) (1983); WASH. REV. CODE ANN. § 7.72.040(2)(a) (West Supp. 1987).

For a discussion of the various procedures states set forth for determining the insolvency of manufacturers, *see* Leete, *supra* note 46, at 1021-23.

65. *Compare* IDAHO CODE § 6-1407 (4)(b) ("[t]he court outside the presence of the jury determines that it is highly probable that the claimant would be unable to enforce a judgment against the product manufacturer") *with* KAN. STAT. ANN. § 60.3306 ("any judgment against the manufacturer obtained . . . would be reasonably certain of being satisfied").

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